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September 26, 1988

Delbert F. Downing, Director  
Water Resources Division  
64 North Main Street  
Concord, New Hampshire 03301

Dear Mr. Downing:

By letter dated September 6, 1988, you requested this office to review proposed hearing procedures relative to dam repair orders. As drafted, the proposed rules provide that the Division will initiate the hearing process by issuing an order. A "waiver of hearing form" will accompany the order. If the dam owner to which the order is issued does not return the waiver of hearing form, the Division will proceed to hold a hearing and issue a final order. This order may then be appealed to the Water Resources Council.

Although the hearing procedure proposed in the regulations generally complies with RSA ch. 482, RSA ch. 541-A, and RSA ch. 21-O, the regulations, as drafted, require revision in several respects. Wr 505.03, which pertains to the preliminary order, references the owner's right to a "public hearing." Although the owner has a right to a hearing which is conducted in accordance with RSA 541-A:16, there is no statutory requirement that a "public hearing" be held. Accordingly, all references in the draft rules to a public hearing should be deleted, and the term "hearing" substituted therefor. The draft rule relating to the "waiver of hearing" form should be expanded to include the actual waiver form, and a statement that the owner waives both the hearing required under RSA 482:9 and the hearing required under RSA 21-O:5.

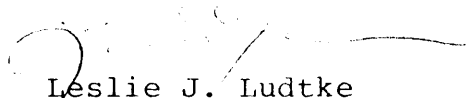


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As presently drafted, the regulations use the term "presiding officer" in Wr 505.07. The statute pertaining to dam repair orders, RSA 482:9, provides that "the division of water resources shall, after notice and hearing, order the owner of the dam to make the requisite repairs..." (emphasis added) The regulations should either define the term "presiding officer" or use the term "division." The proposed regulations should also include a specific provision addressing the content of the notice of appeal. Additionally, the regulations should address whether a motion for rehearing must be filed with the Division before appeal to the Water Resources Council, and whether the appellant is required to state specifically each ground of error in the notice of appeal with adequate citation to evidence offered in the initial hearing. I would also suggest that the period for initiating an appeal be shortened to thirty days.

I trust that this letter is responsive to your inquiry. If you have any additional questions or require drafting assistance, please do not hesitate to contact me.

Sincerely,



Leslie J. Ludtke  
Assistant Attorney General

LJL/sed

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